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IN THE COURT OF APPEALS OF INDIANA

WILLIAM R. KOENIG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0612-CR-564
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Wayne S. Trockman, Judge
Cause No. 82D02-0601-FB-37

July 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

William Koenig appeals his conviction for Class B felony unlawful possession of a firearm by a serious violent felon. We affirm.

Issues

Koenig raises three issues on appeal, which we restate as:

I. whether the trial court erroneously admitted evidence seized at a traffic stop;

II. whether the trial court properly permitted the State to amend its charging information; and

III. whether the trial court properly permitted the State to reopen its case.

Facts

On January 12, 2006, Officers Anna Fillmore and Tyson Vaughn of the Evansville Police Department observed a vehicle whose passenger-side taillight was emitting a bright white light. The police officers pulled over the vehicle, which was driven by Daniel Sutton. Koenig and another passenger were also in the car. Upon learning that Sutton had a suspended driver's license and an outstanding warrant in Kentucky, the officers placed him under arrest. Officer Vaughn approached the passenger side of the car and asked Koenig for identification. Koenig mumbled and would not make eye contact with the officer. Officer Vaughn smelled an odor that he identified as anhydrous ammonia inside the car, and he asked Koenig to step out of the car. Officer Vaughn asked Koenig if he was in possession of any weapons, and Koenig stated that he was not. Officer Vaughn then patted down Koenig for weapons but did not locate any. Next,

Officer Vaughn asked for Koenig's consent to be searched for narcotics, and Koenig permitted the search. Officer Vaughn found a baggie in Koenig's shirt pocket that appeared to contain marijuana, and he placed Koenig under arrest. In the interim, Officer Zane West had arrived on the scene as back-up for the other officers. Officer West performed a full search incident to arrest for weapons on Koenig prior to placing him in his police vehicle. Officer West discovered a .22 caliber handgun in a holster attached to Koenig's belt, which had not been located during the previous search because Koenig was wearing several layers of clothing due to the cold weather. Koenig later admitted to Officer Vaughn that he had previously lied about having any weapons because he was a convicted felon.

The State charged Koenig with Class B felony unlawful possession of a firearm by a serious violent felon ("Count 1"); in the charging information, the State identified Koenig's previous felony as a 1992 conviction for Class A felony attempted robbery. The State also charged Koenig with Class D felony possession of chemical reagents or precursors with intent to manufacture methamphetamine ("Count 2"). Koenig filed a motion to bifurcate the trial, which the trial court granted.

Koenig filed a motion to suppress the evidence, arguing that it was the fruit of an unlawful search and seizure. He contended that the vehicle's taillight was in compliance with Indiana Code Section 9-19-6-4 because the taillight was covered with red tape and was partially emitting a red light; therefore, the officers lacked reasonable suspicion to pull the car over and perform the subsequent searches. The trial court held a hearing and denied the motion.

On October 16, 2006, a jury trial commenced on Count 1. Each officer who was present at the scene of Koenig's arrest was called to testify about the traffic stop and subsequent searches. Koenig renewed his objections to the testimony of the officers, and the court overruled each objection. On the second day of the trial, the State rested.

At that time, Koenig moved for judgment on the evidence. Outside of the jury's presence, he directed the trial court's attention to Koenig v. State, No. 82A01-9205-CR-160, slip. op. at 8 (Ind. Ct. App. Nov. 19, 1992), in which we vacated Koenig's 1992 conviction and sentence for Class A felony attempted robbery because he had also been convicted and sentenced for Class A felony conspiracy to commit robbery. Indiana Code Section 35-41-5-3 prevented a defendant from being convicted for both a conspiracy and an attempt of the same crime. Id. The vacated conviction for attempted robbery was listed by the State as the underlying felony offense in the instant charging information for Count 1. The docket relied upon by the State did not reflect that the attempted robbery conviction had been vacated by the Vanderburgh Circuit Court, as instructed by this court.

The State requested that the trial court permit it to amend the charging information for Count 1 to substitute Koenig's conviction for Class A felony conspiracy to commit robbery as the underlying charge; the State also moved to reopen its case in order to prove that Koenig had been convicted of that offense. Over Koenig's objection, the trial court permitted the State to amend the charging information and reopen its case.

The trial court then explained to the jury that it was permitting the State to reopen its case. The State presented to the jury the abstract of judgment for the conspiracy to

commit robbery conviction. Koenig entered into evidence the Koenig v. State opinion. The jury found Koenig guilty, and the court sentenced him to twelve years incarceration. The State then dismissed the charge against Koenig for Count 2. Koenig now appeals his conviction for Count 1.

Analysis

I. Admissibility of the Seized Evidence

Koenig argues that the trial court erred in overruling his objection and admitting evidence that was seized at the traffic stop. We review a trial court's ruling on the admissibility of evidence for abuse of discretion. Cochran v. State, 843 N.E.2d 980, 983 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion occurs if a decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Koenig specifically asserts that the evidence was the fruit of an illegal search and seizure in that the police improperly stopped the vehicle driven by Sutton. Police officers may stop a vehicle when they observe minor traffic violations. State v. Quirk, 842 N.E.2d 334, 340 (Ind. 2006). The probable cause affidavit indicated that the police officers initially stopped Sutton's vehicle because one taillight was emitting a bright white light, which was not in compliance with Indiana Code Section 9-19-6-4. This section requires that a motor vehicle "must be equipped with at least two (2) tail lamps mounted on the rear that, when lighted," "emit[] a red light plainly visible from a distance of five hundred (500) feet to the rear." Ind. Code § 9-19-6-4(a), (c).

Koenig claims that the uncontested evidence indicates that the taillight was partially emitting a red light because of red tape covering a broken taillight, and any

ambiguity in the statute as to "type, intensity, quality, or size" of the red light should be construed against the State. Appellant's Br. p. 8. A question of statutory interpretation is a matter of law to be determined de novo. Maynard v. State, 859 N.E.2d 1272, 1274 (Ind. 2007), trans. denied. We are not bound by a trial court's legal interpretation of a statute and need not give it deference. Id. We independently determine the statute's meaning and apply it to the facts before us, using the express language of the statute and following the rules of statutory construction. Id. Where the language of the statute is clear and unambiguous, there is nothing to construe; however, where the language is susceptible to more than one reasonable interpretation, the statute must be construed to give effect to the legislature's intent. Id. The legislature is presumed to have intended the language to be applied logically and not to bring about an unjust or absurd result. Id.

We conclude that the language of Section 9-19-6-4 is not ambiguous. It clearly requires that a motor vehicle have two taillights that emit a red light visible from a distance of five hundred feet. Reviewing the evidence most favorable to the trial court's ruling, Officer Fillmore testified at the motion to suppress hearing that the taillight was "glaring," and it appeared to be "mostly just white, until we approached closer and closer, then we could tell there was a little . . . red around it." Tr. p. 13-14. Officer Fillmore estimated that she could see only white light at a distance of about eighty feet from the car. She also testified that she first noticed the red tape after the vehicle had been stopped and she was approaching it on foot. There was no testimony, contested or otherwise, that indicated that red light was visible from a distance of five hundred feet, as clearly required by the statute.

Because the police officers observed a traffic violation, they were entitled to stop the vehicle. Quirk, 842 N.E.2d at 340. Koenig does not claim a lack of consent to the subsequent search by Officer Vaughn in which the baggie containing what appeared to be marijuana was found in his pocket. Koenig also does not contest the search incident to arrest by Officer West in which the handgun was found. The trial court did not abuse its discretion by admitting the evidence seized at the traffic stop.

II. Amendment of Information

Koenig contends that it was improper for the trial court to permit the State to amend the charging information.[1] Indiana Code Section 35-34-1-5 governs the amendment of a charging information. Our supreme court recently clarified:

> [this section] conditions the permissibility for amending a charging information upon whether the amendment falls into one of three classifications: (1) amendments correcting an immaterial defect, which may be made at any time, and in the case of an unenumerated immaterial defect [under subsection (a)], only if it does not prejudice the defendant's substantial rights; (2) amendments to matters of form, for which the statute is inconsistent, subsection (b) permitting them only prior to a prescribed period before the omnibus date, and subsection (c) permitting them at any time but requiring that they do not prejudice the substantial rights of the defendant; and (3) amendments to matters of substance, which are permitted only if made more than thirty days before the omnibus date for felonies, and more than fifteen days in advance for misdemeanors.[2]

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[1] Koenig asserts in an argument heading that it was improper for the court to permit the State to amend the charging information, but he fails to substantively address this contention or cite any applicable authority as required by Indiana Appellate Rule 46(8)(a). We will consider his claim, however, because his arguments of prejudice pertaining to the court's decision to permit the State to subsequently reopen its case are also relevant here.

[2] After Fajardo was decided, the General Assembly amended Section 35-34-1-5 so that a charging information may be amended at any time prior to trial as to either form or substance, provided that the

Fajardo v. State, 859 N.E.2d 1201, 1204 (Ind. 2007) (emphases in original).

Thus, we must first determine whether the amendment to the charging information was one of immaterial defect, form, or substance. Our supreme court explained that

> an amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

Id. at 1207.

Because Koenig was faced with the same charge, he had the same defenses available to him. His conviction and vacated conviction stemmed from almost identical criminal activity, so Koenig's evidence would apply equally to the information in either form. Finally, the amendment was not essential to making a valid charge of the crime. Indiana Code Section 35-47-4-5(c) provides that "[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony." The section defines a serious violent felony as any one of a number of offenses and does not explicitly require the State to list in a charging information the precise conviction for which the defendant has been convicted.

In Fajardo, the State amended the charging information two weeks before trial to add an additional count containing different elements than the original count. The court

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amendment does not prejudice the substantial rights of the defendant. See P.L. 178-2007 § 1 (emergency eff. May 8, 2007). We interpret the version of the statute that was in effect at the time of Koenig's trial; regardless, the change in the statute would not affect the outcome here because the State's amendment of the charging information did not occur until after the trial began.

held that the amendment was substantive and, therefore, it must have been made more than thirty days before the omnibus date. Id. at 1208.

In contrast, our court held in Jones v. State, 863 N.E.2d 333, 338 (Ind. Ct. App. 2007), that an amendment to the information changing the identification of a controlled substance from cocaine to heroin was not a substantive change. We reasoned that the class of the offense, the elements of the crime, and the specific statutory provision alleged to have been violated all remained the same; therefore, the change was one of form or immaterial defect only. Id.

We conclude that the reasoning of Jones is applicable here. The State changed the identification of Koenig's prior felony in the information, but the class of the offense, many elements of the crime, and the statutory provision alleged to have been violated remained unchanged. Therefore, the change is not substantive, but only one of form

We next consider whether Koenig's substantial rights were violated by the amendment. See Fajardo, 859 N.E.2d at 1204. A defendant's "substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights." Jones, 863 N.E.2d at 338. Koenig had sufficient notice, in that he informed his counsel in advance of the trial that the offense listed in the underlying charge had been vacated. His counsel elected to divulge the vacated conviction after the State rested at as a matter of "trial strategy." Tr. p. 169. Koenig had the opportunity to be heard regarding the amendment because the trial court permitted argument by Koenig and the State prior to deciding to allow the State to amend the

information. The nature of the offense did not change. We conclude that Koenig's substantial rights were not violated by the amendment.

III. Reopening of the State's case

Koenig finally argues that it was an abuse of discretion for the trial court to permit the State to reopen its case to demonstrate that Koenig had been convicted of a serious violent felony. Koenig essentially argues that the State intentionally rested at a time when it had not proven an element of the offense, and it was an abuse of discretion for the trial court to permit the State to reopen its case.

Generally, a party should be permitted the opportunity to reopen its case to submit evidence that could have been part of its case-in-chief. Saunders v. State, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004). Whether to grant a party's motion to reopen its case after having rested is a matter committed to the sound discretion of the trial court. Id.

> The factors that weigh in the exercise of discretion include whether there is prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request.

Id.

In King v. State, 531 N.E.2d 1154, 1161 (Ind. 1988), our supreme court upheld a defendant's conviction where the trial court permitted the State to reopen its case. At the close of the State's case-in-chief, the defendant had moved for judgment on the evidence alleging that the State had failed to prove the date of the felony commission in a habitual offender charge. The trial court permitted the State to reopen its case to prove the date.

The supreme court held that the decision was "within the scope of its authority and not an abuse of discretion." Id. See also Saunders, 807 N.E.2d at 126 (holding that it was not an abuse of discretion for the State to reopen its case to have a witness identify the defendant because the evidence "could have been part of the State's case-in-chief").

Here, the State could have presented the information of Koenig's felony conspiracy conviction during its case-in-chief. The trial court docket failed to disclose that the attempted robbery conviction had been vacated, but the State was aware that Koenig had been convicted of another serious violent felony. The change did not cause inconvenience at the trial because the parties told the court that they would be ready to proceed a few minutes after the court made its decision. The change apparently did not cause any confusion; the court explained to the jury that the State was going to present a few more items of evidence due to some motions and rulings that were made outside of the jury's presence.

Koenig also argues that he was prejudiced by the State's reading of a portion of the Koenig v. State opinion in its closing argument because it contained facts relating to a murder for which Koenig had been acquitted. However, Koenig did not object to the State's reading of the opinion during closing argument. When a defendant does not make a contemporaneous objection to a statement made by a prosecutor during closing argument, he does not preserve the issue for appeal. Bald v. State, 766 N.E.2d 1170, 1173 (Ind. 2002). Furthermore, the opinion was Koenig's own evidence, and he specifically asked the court that it be "displayed to the jury." Tr. p. 176. We conclude that it was not an abuse of discretion for the trial court to permit the State to reopen its

case to prove that Koenig had been convicted of a serious violent felony. As our supreme court has noted, "[A] trial is not a game of technicalities but one in which the facts and truth are sought." Eskridge v. State, 258 Ind. 363, 369, 281 N.E.2d 490, 493 (1972).

Conclusion

The trial court did not err in admitting the evidence seized at the traffic stop. It was not an abuse of discretion for the trial court to permit the State to amend its charging information and reopen its case. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.